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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1966**

## No. 250

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LLOYD ELDON MILLER, JR.,

*Petitioner,*

vs.

FRANK J. PATE, Warden of the Illinois State Penitentiary, Joliet, Illinois,

*Respondent.*

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## REPLY BRIEF FOR PETITIONER

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Our main brief answers substantially every contention advanced by respondent. We can, therefore, be brief.

It is noteworthy that respondent does not challenge a syllable of our recital of facts (Pet. 5-18). All we have said regarding the suppression of the hair, the lie about the hair, the paint on the shorts, denial of opportunity to make a scientific examination of the evidence, the prosecution's advice to the landlady about her "constitutional right" not to talk, failure to reveal Betty Baldwin's unreliability, her lie on the stand in 1956, and her subsequent recantation of the circumstances of the confession—every word is uncontradicted. Respondent does not challenge our principal legal propositions, for indeed he cannot. Hence, to avoid the logic of our facts and the force of our argu-

ment, respondent advances a medley of contentions. These contentions, in any case, should be unacceptable: they add irony to irony. In this capital case they are fearful in their implications and practical consequences.

## I.

Respondent 4-5 recognizes the expanded role of discovery in criminal cases. But we are told quickly (Resp. 5) that in a criminal case, discovery should be more limited than in a civil action, since discovery cannot operate reciprocally by reason of the constitutional privilege against self-incrimination.

Implicit of this argument is the fallacy that the Constitution conditions its grant of Fifth Amendment rights upon waiver of some due process rights otherwise available under the Fourteenth.

It is an irony that such contention should be advanced here where petitioner took the stand, waiving his privilege against self-incrimination.

Respondent 5 admits that in the discretion of the Court "on a proper showing of necessity an accused may examine the physical evidence in the hands of the prosecution". It is a further irony that the authority cited is *People* v. *Miller,* the 1958 Illinois Supreme Court decision, in the very case at bar, where such examination was denied.

But the first paragraph of Respondent 6 is beyond irony. There we are told that while the trend is toward a greater scope of discovery in criminal cases, "this trend should be developed in such a manner as the increased scope of discovery will be applied prospectively and not be applied so as to reverse convictions properly obtained in light of

the rules in effect at the time of the trial." Respondent seems to recognize that by today's standard the discovery that was sought should be allowed—but that relief should be denied to this petitioner despite the suppression by the prosecution of evidence of innocence.

## A.

Respondent 7-8 quotes at length from the report of Forrest Litterly which establishes that the hair found in the vagina of the deceased was not petitioner's. To our argument that the failure to reveal these facts was a constitutional deprivation, Respondent 6 quotes the key passage we quoted, Pet. 21, from *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) and makes the rejoinder that the evidence suppressed was not "material." Respondent 8, in support of this contention, quotes from the opinion of the Court of Appeals which contends the hair could have been accidentally deposited by a doctor or police officer. We have already commented upon this portion of the opinion (see Pet. 23-24). The Court of Appeals proceeds on the erroneous assumption that the hair was found on the surface of the body. *This is not true.* The coroner, Dr. Raymond J. Mercey, while the body was still in the operating room, immediately after death took a vaginal smear. Litterly found the hair on a tissue, in a vial labeled "Janice May—11/26/55—Dr. R. J. M." The vial was still sealed with surgical tape (Pet. Ex. 6, pp. 1 and 3). For reasons stated here and at Pet. 23-24, and Amicus 4-7, the hair clearly belonged to the attacker.

Moreover, Litterly compared the hair with a sample of petitioner's pubic hair and with hair from no other region of the body. Clearly Litterly considered the hair from the vagina a pubic hair. Respondent accepts without a

word of challenge Amicus 7 which makes the point that hairs from different regions of the body are distinct and can be identified microscopically. The probability that a stray hair would be a pubic hair is infinitesimally small.

But Respondent 9 clings to the stray hair contention. That was an argument to be advanced to a Hancock County jury after it had been informed of all the facts. Respondent, like the Court below, purports to sit as that jury, and brush aside this evidence. This, we submit, should not be tolerated.

What is more, respondent's contention in effect shifts the burden of proof to defendant in a criminal case. Had petitioner known of the hair and presented it as part of his case in chief, the burden would have been on the prosecution, in rebuttal, to establish the stray hair hypothesis, else the jury could have concluded that it was conclusive—of innocence. It truly demolished the prosecution case. Respondent, to salvage its case, seeks to step into the jury box and render his own verdict of speculation and conjecture.

Respondent 9 contends that the District Court finding quoted is conclusive on review, unless clearly erroneous. Here, petitioner claims violation of constitutional protections. Times beyond number this Court has declared:

> "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting as it does, on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter (U.S.), 1 Wheat. 304. . . ." (*Napue* v. *Illinois*, 360 U.S. 264, 271, 3 L. Ed. 2d 1217, 1222, 79 S. Ct. 1173 (1959). The rule has been

widely applied. See e.g., *Haynes* v. *Washington*, 373 U.S. 503, 515-516, 10 L. Ed. 2d 513, 522, 83 S. Ct. 1336 (1963).

The rule surely finds application here where the finding is not the result of a weighing of disputed evidence, but conclusory opinion respecting undisputed facts. To let it control would be to decide the very question before this Court on this issue. Further, findings based on documentary evidence are subject to free review, unaffected by presumptions which ordinarily accompany findings on controverted issues. (*U. S.* v. *United States Gypsum Company*, 333 U.S. 364, 394 (1948).) The authorities are collated in 5 Moore's Federal Practice, Second Edition, Para. 5204 (Page 2637).

Respondent 9 states that petitioner had stated the hair was not his and "had the opportunity on cross-examination to inquire into the result of any test made on this hair." Cross-examine whom? The State presented no witness who testified about a hair. Petitioner had been told that the hair matched his. Should he have invited the State to bring in evidence he had been told was damning? Should he have anticipated this enormous lie and gambled that a witness, presumably Litterly, would tell the truth? The very Litterly who had no scruples about identifying the "staining material" on the shorts as blood, when it was paint?

Next, Respondent 10 seeks to escape from *Brady* v. *Maryland*, 373 U.S. 83, claiming that a request for the suppressed evidence is essential and that there was none here. Respondent wrenches out of context the *Brady* "on request" words. The language arose from the *Brady* facts (see Pet.

21): there, the defense knew statements had been taken and so requested them. The respondent would emasculate *Brady* by making a request for the suppressed evidence a condition to asserting constitutional deprivation. The suggestion borders on fatuity.

There was a request, moreover, by petitioner well in advance of trial for a scientific examination of the physical evidence by his expert. This request was opposed by the prosecution, denied by the trial court, and the denial upheld by the Supreme Court of Illinois.

To Respondent 10 this request was inadequate because it was "only a general request." Again, respondent seeks to impose a specificity on petitioner which he knows will defeat discovery. Again we are referred to the decision of the Illinois Supreme Court in this very case, holding that denial of the request was proper because there was no showing of abuse of discretion. Of course there was no such showing. The most dramatic and persuasive evidence of the need for the examination was the very evidence which would have been uncovered.

Respondent 10 contends that that decision was correct because the proceedings of the motion were not preserved or incorporated into the record. Again we say: the motion is in the record (IV R. 2). The best argument for the motion could not be in the record because it was concealed from petitioner.

Respondent does not attempt to distinguish our other authorities holding suppression unconstitutional (Pet. 21-23).

B.

We have commented fully in our main brief regarding the suppression of the paint on the shorts, the cruel hoax of palming off paint as blood, the critical gap in the prosecution's theory created by the paint, and Litterly's positive assertion of blood Type A when he was not really positive (Pet. 7-8, 24-27).

In fact, permitting Litterly to testify that the "staining material" was blood when the prosecution admits knowing it was paint (Resp. 11) appears to be a violation of the pre *Napue* v. *Illinois*, 360 U.S. 264, and the *Powell* v. *Wiman*, 287 F. 2d 275 perjury rule as stated by Respondent 17-18 in connection with Betty Baldwin: perjury on a question relating to guilt or innocence and not only respecting credibility of a witness.

C.

We have already answered respondent's contentions (Resp. 13-4) concerning Mrs. Baxter (Pet. 11-13, 35-38). There is additional strong authority for our position in *Gregory* v. *U. S.*, —— F. 2d —— (July 28, 1966) (see 35 L.W. 2095). There, the District of Columbia Court of Appeals set aside a conviction where the prosecution advised its witnesses to talk to the defense only in its presence (Slip. Op. 3-6). Protecting petitioner's Sixth Amendment right to compulsory process (see Pet. 37-38) is the mirror image of protecting the right to confront witnesses. See *Parker* v. *Gladden*, —— U.S. ——, 35 L.W. 4097 (December 12, 1966).

## D.

Regarding the unreliability of Betty Baldwin Curry, there is little we can add to what we have already said (see Pet. 8-11 and 30-35). We fail to understand how the prosecution could have believed the trial testimony of Betty Baldwin, since, as Respondent 15 concedes, the prosecution attempted to have her called as a Court's witness. Respondent tells us candidly "Her subsequent retraction of her testimony leaves open the question of which time she was telling the truth". The calling of Betty Baldwin as a witness would be horror enough if the evidence of her unreliability first came to light after the 1956 trial. When we remember that her unreliability was well-known to the prosecution months in advance of the trial, putting her on the stand is little short of incredible.

Respondent 15-16 relies heavily on *Taylor* v. *U. S.*, 238 Fed. 2nd 409 (C.A. 9, 1956). The *Taylor* appeal was without counsel. Apparently, there was no contention of prosecution suppression of evidence of the unreliability of informers. All that appears is that there was some discrepancy between the testimony of a government agent and that of the informer respecting sequence and duration of meetings. See 238 Fed. 2nd at 412-413.

Respondent relies also on *U. S. ex rel. Rooney* v. *Ragen*, 173 Fed. 2nd 668 (1949), cert. denied 337 U.S. 961. In our main brief (Pet. 35), we pointed out that there was no showing in the *Rooney* case as here, of prosecution use of known perjured testimony. Further, unlike *Rooney*, here there were additional facts impeaching Betty Baldwin's reliability known only to the prosecution, e.g. the lies regarding narcotic sales.

We have already answered at Pet. 34 respondent's attempt (p. 18) to reconcile Betty Baldwin's testimony at the trial that she had known Miller for two years, and her pre-trial statement that she had known him for five weeks. Respondent overlooks the heart of the matter, namely how long she had known petitioner was not a mere preliminary. It was designed to impress upon the jury that the petitioner had known Betty Baldwin so long that he would reveal a major crime to her. Therefore, the crucial point was how long Betty Baldwin had known petitioner before November 26, 1955. The time subsequent was irrelevant. Even on respondent's own terms, her testimony was a lie, for she doubled from 11 months to two years, this term of acquaintance. The attempt at Respondent 17 to distinguish *Powell* v. *Wiman*, 287 Fed. 2nd 275 (C.A. 6th, 1961), fails. There, there was a suppression of a long history of mental illness, together with testimony by a witness directly contrary to a written statement in the hands of the prosecution. Here, there is a long period of bizarre behavior by Betty Baldwin coupled with testimony directly contrary to a written statement in the hands of the prosecution.

## II.

Respondent attempts to explain away the lie about the hair, claiming that Litterly's report was dated December 7, 1955, and that therefore the prosecution did not know on the night of November 30 that the hair did not match petitioner's. We pointed out, Petitioner 6, that Litterly received the vial at 2:00 P.M. on November 28. A sample of petitioner's pubic hair was taken at 6:00 P.M. on November 29. The false statement to petitioner was made on the night of November 30 (Pet. 16). Thus, the prosecution had over 24 hours in which to compare the hairs.

We believe that taking of a pubic hair sample from Petitioner immediately was for the specific purpose of making a hair comparison, and that the prosecution knew the truth when it told a lie. When petitioner said, "Them hairs don't belong to me," he added, "And the chemist just looked at me and smiled" (IV R. 95). But it makes no difference whether a hair comparison had been made by the night of November 30 or not. The important fact is that the prosecution either made a false statement to petitioner in order to induce confession, or made the statement *not caring* about the truth simply to erode petitioner's will to induce a confession.

*Young* v. *U. S.*, 107 F. 2d 490 (C.A. 5th, 1959) and *Lewis* v. *U. S.*, correct citation 74 F. 2d 173 (C.C.A. 9th, 1939) are out of harmony with *Spano* v. *New York*, 360 U.S. 315 and *Leyra* v. *Denno*, 347 U.S. 556 (Pet. 41), and must yield to them.

Without question, petitioner was held incommunicado and as Respondent 22 admits was told, and falsely, his parents wished to have nothing to do with him (Pet. 15 and 42), as part of the strategy to weaken his will. Respondent 22 complains the incommunicado issue was not rebutted because not raised in the District Court or Court of Appeals. The issue was raised by petitioner in the 1956 trial and was not rebutted there by the prosecution.

We have already answered Respondent's remaining contentions.

Respectfully submitted,

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